Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLA RICHMAN,
as Special Administrator of the Estate of
JACK B. RICHMAN, deceased,
Petitioner,

v.

BRIAN BURGESON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment standard of objective reasonableness for excessive force claims pursuant to the Federal Civil Rights Act of 1871 (codified as amended at 42 U.S.C. § 1983), the basic factors to evaluate the necessity of force under the Fourth Amendment being stated in *Graham v. Connor*, 490 U.S. 386 (1989), is violated by the holding in the decision below that governmental interests outweigh the arrestee's Fourth Amendment interests if a person resists arrest, with no qualification as to the type, amount, or context of the resistance, or the type and degree of force used in response, and thus the use of any and all force in response to "resistance" is constitutionally sanctioned, despite that *Graham v. Connor* limits consideration of resisting arrest to only "active" resistance to arrest, as to which the lower courts are in disarray?

PARTIES TO THE PROCEEDING

Petitioner is Marcella Richman, as special administrator of the Estate of Jack B. Richman, deceased, plaintiff-appellant below.

Respondents (18) are: Brian Burgeson, John Dorner, Brian Foster, Marty Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken Clark, Moira Weyrich (n/k/a Moira Lowry), Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wisch, and Michelle Zimmerman, who are or were Deputy Sheriffs of Cook County, Illinois, in their individual capacities, defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcella Richman, as special administrator of the Estate of Jack B. Richman, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is not reported, and is reproduced in the Appendix to the Petition. App. 4. The portions of the trial transcript containing the evidentiary ruling of the District Court are reproduced in the Appendix. App. 10.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 2009, App. 4. The Court of Appeals granted Petitioner's motion for an extension of time to file a petition for rehearing on January 7, 2010, App. 8, and denied the timely petition for rehearing and suggestion for rehearing *en banc* on January 29, 2010. App. 2. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871), codified as amended at 42 U.S.C.A. § 1983 (2003), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was

> violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents a recurring question on a matter of national importance regarding the definition of the "actively resisting" factor set out in *Graham v. Connor*, 490 U.S. 389 (1989), one of the factors by which Fourth Amendment objective reasonableness of the use of force by law enforcement officers is determined pursuant to excessive force claims under 42 U.S.C. § 1983.

Petitioner Marcella Richman is the mother of Jack B. Richman, deceased, who died from positional asphyxia caused by Cook County Sheriffs deputies during a restraining incident in a Cook County, Illinois, courtroom in November 1997. The restraining occurred after Jack Richman had been speaking to the judge as a witness to a traffic ticket, and the judge summarily convicted him of misdemeanor contempt of court, sentenced him to 120 days in jail, and ordered him to be arrested and removed from the courtroom.

Petitioner's claims for Fourth Amendment excessive force and Eighth Amendment unconstitutional punishment pursuant to 42 U.S.C. § 1983 for the 1997 restraining death of her son

were tried in the District Court during July and August, 2008. The jury returned a verdict for defendants on all counts.

Petitioner's Motion for a New Trial in the District Court pursuant to Fed. R. Civ. Pro. 59(a) based on the verdict being against the manifest weight of the evidence was denied. She appealed the jury verdict on the basis of the District Court's erroneous, unfairly prejudicial admission of Decedent's prior unrelated arrest, and on the basis that the jury ignored evidence of conclusive liability of excessive force on the Fourth Amendment claim.[1]

This case was before the Circuit Court twice before, # 00-2173 and # 07-1487, with opinions reported at: *Richman v. Sheahan et al.*, 270 F.3d 430 (7th Cir. 2001), *cert denied, sub nom. Burgeson, et al. v. Richman*, 535 U.S. 971 (2002), "*Richman I*", and *Richman v. Sheahan, et al.*, 512 F.3d 876 (7th Cir. 2008), "*Richman II.*"

Basis for Federal Jurisdiction in the Court of First Instance:

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[1] Attorney for Petitioner Dolores C. Pino discloses that she knew Decedent Jack Richman personally, and prior to becoming Plaintiff's attorney for this appeal, testified at the jury trial, in deference to the Plaintiff's trial counsel's last-minute request. This was as a "damages" witness, discussing what was lost by Jack Richman's death to the environmental issues on which he worked. None of the issues on which she testified are relevant to the issues in this appeal.

This suit for deprivation of the Decedent's Fourth Amendment right to be free from excessive force upon seizure was properly brought in the District Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(a)(3).

The appeal to the Court of Appeals was permitted by law as of right, pursuant to 28 U.S.C. § 1291, from the final decision of the District Court – the jury verdict in favor of all defendants on all counts, entered on August 25, 2008.

The deadline for appeal was extended by the filing of Plaintiff's Motion for a New Trial Pursuant to Fed. R. Civ. Pro. 59(a) on September 8, 2008, and by the order of the District Court denying Plaintiff's Motion for a New Trial entered on November 5, 2008.

Plaintiff filed a Motion for Extension of Time to File Appeal on January 5, 2009, and the District Court granted the extension to file appeal in its order entered on January 15, 2009.

The Notice of Appeal was filed on January 23, 2009, pursuant to Fed. R. App. Pro. 4(a)(5)(C). The proper filing fee was paid on January 30, 2009. The appeal to the Court of Appeals was from the final order of the District Court entering the jury verdict in favor of Defendants, disposing of all parties' claims.

Facts:

1) The trial record contains no evidence that any Defendant knew of Jack Richman's prior arrest for domestic battery (for which the charges were dismissed). See Defendants' transcripts. (While not every witness' trial transcript was ordered for this appeal, Defendants raised no issue or objection as to any missing evidence from this record on appeal in their response brief in the court below.)

2) It is undisputed that the Decedent did not resist arrest whatsoever during the prior unrelated arrest.

3) While Defendants held Jack Richman prone, he kicked his legs up, but some of the Defendants then held his legs to stop the kicking. See Foster Tr.

4) It is undisputed that Defendants did not monitor his breathing while they held him prone. See Defendants' transcripts; Greve Tr. 35-36 (did not hear any officers asking if Richman was OK or whether he was breathing).

5) It is undisputed that one of the Deputies heard him trying to catch his breath while other Deputies held him prone. Pickell Tr. 120-21, 145; Greve Tr. 63-64 (did not attempt to intervene because nothing wrong with what they were doing, saw no others attempt to intervene).

6) No Deputy did anything to help him breathe while they held him prone up until he displayed no signs of life and they turned him over. See Defs.' transcripts.

7) It is undisputed that four of the Defendants who helped hold Jack Richman prone or assisted with those who were holding him prone testified that that they had been trained, prior to the date of the incident at issue, that they could hurt someone by prone restraint, including affecting their breathing. Mendez, Tr. 78-79, 80-81, Dorner, Tr. 54, 74-75, McPhillips Tr. 90, Burgeson, Tr. 228.

8) It is undisputed that the Medical Examiner's representative testified at trial that the mechanism of death was restraint hypoxia from a belly-down position, causing oxygen deprivation and then heart arrhythmia. Dr. Fusaro Tr. 37-38.

9) It is undisputed that Defendants placed Jack Richman on his belly and held him there until he showed no signs of life. See Defs.' Admission of Facts, Final Pretrial Order.

Reasoning of Decision Below in Relation to Question Presented:

This is an appeal from the jury verdict in favor of Defendant Deputy-Sheriffs on all counts in Petitioner's 42 U.S.C. § 1983 suit for the restraining death of her son.

The Seventh Circuit issued a nonpublished decision pursuant to Fed. R. App. P. 32.1 on December 23, 2009 affirming the jury verdict for Respondents.

In the court below, Petitioner raised that the District Court's admission into evidence at trial an unrelated prior arrest for domestic battery, for which the charges were dropped, was reversible error because it is undisputed that the Decedent did not resist arrest on the prior occasion, and that he did resist arrest during the incident at issue.

The panel decision below affirmed the jury verdict in favor of the Respondents on all counts, holding that the District Court's admission into evidence of an unrelated prior arrest for domestic battery, for which the charges were dismissed, was not an abuse of discretion because the prior arrest was related to the Decedent's "knowing how to behave during an arrest." Panel Decision at 2, App. 6. The decision below cited as supporting authority for this basis two criminal drug cases in which prior bad acts were admitted into evidence pursuant to FED. R. EVID. 404(b) based on the prior arrests being related to the defendant's knowledge or intent regarding illegal drug use or sales. Panel Decision at 2, App 6.

The panel decision held: " Richman's testimony implied that Jack had never been arrested and thus did not know how to behave when restrained. The defendants' evidence that Jack had been arrested

before, had gone quietly, and was not maltreated was probative to rebut Richman's contentions." Panel Decision at 2, App. 6.

This reason used by the panel decision to affirm the District Court is a different reason than the one used by the District Court in admitting the prior arrest, which was either the "opening the door" doctrine or "impeachment" of a witness' credibility. Plaintiff's Opening Brief below at 11.

The decision below also summarily affirmed the District Court's denial of the Petitioner's motion for a new trial based on the verdict being against the manifest weight of the evidence, holding that "we remanded this case for trial precisely because the evidence could support a verdict for either side." App. 7.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over Whether "Resistance" under *Graham v. Connor* Fourth Amendment Reasonableness of Force during Seizure May be Considered in Isolation or is Only a Subcategory of Defeating Arrest by Force or Flight or Invoking the Officers' Right of Self-Defense.

The panel decision's holding that "knowing how to behave during an arrest" is a proper, relevant piece of evidence in an excessive force claim under 42 U.S.C. § 1983, and establishing

a rule of law that if one does resist arrest, any and all force used thereafter, without qualification, is constitutionally reasonable, is in direct conflict with *Graham v. Connor* and its application in most Circuits, as well as with the legal history of the justifications for use of force by law enforcement officers.

A. This Case Squarely Presents the Conflict.

1. The first aspect of the conflict is whether "resistance" may be considered in isolation as a factor under *Graham v. Connor*

Precedential opinions of the Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits are in direct conflict with the holding of the Seventh Circuit in the decision below, by recognizing that consideration of "resisting" arrest to determine Fourth Amendment objective reasonableness of force under the *Graham v. Connor* factors is limited to *active* resistance that could defeat the arrest by force or flight, or imminently threaten bodily harm to the officers or others.

Contrary to the Seventh Circuit, these circuits have held, in accord with the legal history of the justifications for use of force, that there is no strong governmental interest to justify the use of force by law enforcement officers for solely *passive* resistance without flight or threat of imminent bodily harm.

The decision below, holding that the prior, unrelated arrest was a fact in issue because it was related to Decedent's "knowing how to behave during an arrest", and because it showed he did not resist arrest on the prior occasion (" Richman's testimony implied that Jack had never been arrested and thus did not know how to behave when restrained. The defendants' evidence that Jack had been arrested before, had gone quietly, and was not maltreated was probative to rebut Richman's contentions"), is in direct conflict with the meaning of the *Graham v. Connor* "actively resisting" factor. Panel Decision at App. 6.

Like the Seventh Circuit in the decision below, the Eighth Circuit misstates consideration of resistance under *Graham* solely as "whether the suspect was resisting arrest", *Littrell v. Franklin*, 388 F.3d 578, 583 (8th Cir. 2004). In *Littrell*, the court also applied the consideration of resistance in a manner contrary to the meaning and derivation of "actively resisting". The court upheld the grant of quality immunity to an officer who broke a female arrestee's upper arm bone via a "straight arm bar takedown" because she became "confrontational" and resisted arrest by struggling not to be handcuffed, without any analysis as to whether she was about to defeat the arrest by fleeing or posing an imminent threat of bodily injury to the officer. *Id.* at 580-81.

Contrary to the Seventh and Eighth Circuits, the Second Circuit specifically held that damaging wrists, dragging, and shoving actions by officers on purely passively resisting, nonviolent suspects are sufficient to allow a reasonable factfinder to conclude that excessive force was used. *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 118, 123-24 (2nd Cir. 2004) (concluding that anti-abortion protestors who employed "passive" resistance techniques including going limp stated Fourth Amendment violation against officers who used choke holds and wrist-bending, because jury could conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances.")

Similarly, the Sixth Circuit, in *Scott v. Clay Cty., Tenn.*, 205 F.3d 867 (6th Cir. 2000) ("the vehicular perpetrator was actively resisting arrest by eluding representatives of the criminal justice system"), in reversing district court's denial of summary judgment on qualified immunity for defendants in an excessive force claim by passenger in fleeing vehicle, recognized the meaning of the "actively resisting" factor, by properly defining it in terms of defeat of the arrest (by a suspect who was threatening imminent harm by a high speed car chase). *Id.* at 877.

Ninth Circuit decisions also specifically hold and recognize the clear distinction between active and passive resistance to arrest, and the

significance of each for the amount force that will be constitutionally reasonable for each. *See, e.g.*,

▪ *Headwaters Forest Def. v. County of Humboldt*, 240 F.3d 1185, 1202-03 (9th Cir. 2000) (vacated and remanded on other grounds sub nom. *County of Humboldt v. Headwaters Forest Def.*, 534 U.S. 801, 122 S.Ct. 24 (2001) (defendants' argument that "lock-down" devices used in nonviolent sit-in protest were "active" resistance to arrest justifying pepper spraying protestors' faces is belied by police dept.'s own definition of active resistance, which is when "subject is attempting to interfere with the officer's actions by inflicting pain or physical injury to the officer without the use of a weapon or object.")

▪ *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001): ("[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used."), and citing and paraphrasing *Headwaters*, 240 F.3d at 1203 ("the fact that the police defendants were increasingly frustrated by the protesters – who had developed techniques such as lock-down devices to prolong nonviolent civil protests – is irrelevant under *Graham*.") *Deorle*, 272 F.3d at 1281.

▪ *Winterrowd v. Nelson*, 480 F.3d 1181, 1186 (9th Cir. 2007) (law enforcement officers not entitled to

use force to gain compliance where no immediate threat posed);

▪ *Bryan v. McPherson*, 590 F.3d 767, 781-82 (9th Cir. 2009) ("[i]n the excessive force context, it is clearly established that 'force is least justified against nonviolent misdemeanants who do not flee or actively resist and pose little or no threat to the security of the officers or the public.'", internal citations omitted.) In *Bryan*, the Ninth Circuit panel thoroughly analyzed the distinctions between passive and active resistance to arrest and their relationship to the justifications for the use of force:

> [b]y shouting gibberish and hitting himself in the quadriceps, Bryan may not have been perfectly passive. "Resistance," however, should not be understood as a binary state, with resistance being either completely passive or active. Rather, it runs the gamut from the purely passive protestor who simply refuses to stand, to the individual who is physically assaulting the officer. We must eschew ultimately unhelpful blanket labels and evaluate the nature of any resistance in light of the actual facts of the case.

Id. at 778-79.

The Tenth Circuit also analyzes excessive force claims by distinguishing the type and amount of resistance to arrest in applying the *Graham* "actively resisting" and "attempting to evade arrest by flight" factors: "we are faced with the use of force – an arm-lock, a tackling, a Tasering, and a beating – against one suspected of innocuously committing a misdemeanor, who was neither violent nor attempting to flee." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1282, 1285 (10th Cir. 2007) ("*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest.")

Similarly, the Eleventh Circuit has specifically held that the *Graham* "actively resisting" factor does not stand alone but is part of defeating arrest by force or flight. *See Lee v. Ferraro*, 284 F.3d 1188, 1198 (11th Cir. 2002). In that opinion, the Eleventh Circuit reviewed the three named *Graham v. Connor* factors, and then paraphrased those factors before the application of the rules to the facts, combining "actively resisting" and flight into one phrase, "the risk of flight". *Lee v. Ferraro*, 284 F.3d at 1198. So the *Graham v. Connor* "actively resisting" factor was subsumed into the Eleventh Circuit's phrase, "risk of flight".

Therefore, the decision below on this question stands in direct conflict with other Circuits.

Current and Historical Legal Authority for the *Graham v. Connor* "actively resisting" factor

The panel decision implies that resistance to arrest, standing in isolation and without any qualification, is a "matter in issue" or a "fact of consequence" in an excessive force claim pursuant to 42 U.S.C. § 1983.

To allow litigants within the Seventh Circuit's jurisdiction to cite this holding as persuasive authority under Fed. R. App. P. 32.1 would be contrary to existing law.

This panel decision holding adds content to the *Graham v. Connor* "actively resisting" factor that is a clear error of law. A new rule of law that the Decedent's resisting arrest during the incident at issue immunized and rendered constitutional any and all force used by the Respondents thereafter cannot be added by the panel decision below because there is no such element of a 42 U.S.C. § 1983 excessive force cause of action, and it directly conflicts with *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) and *Graham v. Connor*, 490 U.S. 386, 396 (1989), as well as the history of the common law on use of force in relation to resisting arrest.

There is no separate legal element of the excessive force cause of action pursuant to 42 U.S.C. § 1983 that a person may never resist arrest, without any qualification, and that if

they do, any force used thereafter is justified. S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, 3-441 (4th ed. 2008).

The qualifications that must be attached to "resisting arrest" are actual flight/ attempts to flee and use of force by arrestee that implicates either impending success of flight or the right of self-defense of the law enforcement officers, which is also qualified by the rule that lethal force may not be used on fleeing or stationary misdemeanants or stationary suspects or suspects who are using low-level, "passive" resistance. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Graham v. Connor*, 490 U.S. 386 (1989).

The history of "resisting" arrest as a factor to be considered in judging use of force by law enforcement officers is recorded in pre-*Graham* summaries of the common law. *See, e.g., Kidd v. O'Neil*, 774 F.2d 1252, 1257 n.4 (4th Cir. 1985) ("[t]his constitutional test of reasonableness essentially parallels and indeed ultimately derives from common law principles of police officer privilege in making forcible arrests", citing *Garner* and Restatement (Second) of Torts § 132 and comment (a).

The meaning of the *Graham v. Connor* "actively resisting" factor is reflected in the Restatement (Second) of Torts, §§ 131 and 132. The only place "resisting" arrest is actually

mentioned is in comment (e) to § 131, Restatement (Second) of Torts, Vol. 1, § 131 (Use of Force Intended or Likely to Cause Death), and the mention of resisting is solely related to defeating the arrest through use of flight or force by the arrestee, which includes the self-defense aspect of force allowed by officers in response to force inflicted upon them by the arrestee during a flight attempt. *See also,* Restatement (Second) of Torts, Vol. 1 § 132, comment c, p. 237 (1965) (Amount of Force).

In *Kidd v. O'Neil*, 774 F.2d 1252, 1256-57 (4th Cir. 1985), the Fourth Circuit discusses the legitimate interest of the state in apprehending suspects as being threatened when suspects resist arrest, in terms of "forcibly resisting arrest" or attempting to defeat arrest by fleeing, with or without force. *Id.* at 1256. The Fourth Circuit concludes:

> By necessary implication from *Garner*'s analysis then, the use of any significant force, up to and including deadly force, not reasonably necessary to effect an arrest – as where the suspect neither resists nor flees or where the force is used after a suspect's resistance has been overcome or his flight thwarted – would be constitutionally unreasonable.

Kidd, 774 F.2d at 1256-57.

That to consider "resistance" to arrest in isolation and without any qualification in determining Fourth Amendment objective reasonableness of force is a clear error of law is further proven by the relevant Model Penal Code provisions. The Court has attributed special importance to the authority of the Model Penal Code, adopting the Code's deadly force standard in in *Garner*, § 3.07(2)(b)(iv), *Garner*, 471 U.S. 1, 3, 6 n. 7, 11-12. *See also, e.g.*, Richard S. Frase, "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?" 89 Minn. L. R. 571, 614 n.203 (2005) ("[t]he linkage of Fourth Amendment reasonableness standards with the Model Penal Code justification rules shows that constitutional and nonconstitutional proportionality principles draw from similar underlying values.")

Here, the Model Penal Code, Part 1 (ALI, 1985) in sections §§ 3.04(1), General Principles, 3a "Resisting Arrest", p. 43, (the actor does not lose his justification to resist arrest if the officer uses more force than is necessary to effect the arrest, or otherwise constitutes a danger to the safety of the citizen), 3.07(1) (use of force justified when making an arrest and actor believes such force is immediately necessary to effect a lawful arrest), 3.07(3) (force justified to prevent escape), also makes the clear that the purpose of force is to effect the arrest, not to counter "resistance" to arrest as

an isolated factor. Also, the Code limits deadly force to apprehension of serious injury, *e.g.*, 3.04 General Principle 4, p. 47.

See also, the report by the Int. Ass'n of Chiefs of Police, "Protecting Civil Rights – A Leadership Guide (2006)" at 119-22 (many agencies train officers to consider the amount of resistance they face and to apply force only as necessary to respond to that amount of resistance).

Therefore, the holding in the decision below, that "resistance", without any qualification, is a fact of consequence in a Fourth Amendment excessive force claim pursuant to 42 U.S.C. § 1983, is incorrect as a matter of law under *Graham v. Connor* and the relevant legal history.

2. The decision below is also in direct conflict with other Circuits on whether governmental interests outweigh the arrestee's Fourth Amendment interests if a person resists arrest, with no qualification as to the type and degree of force used in response.

Circuits that are in direct conflict with the decision below, specifically holding that the factors by which excessive force is determined include that the force used be necessary in type and degree (proportional) to the circumstances, include:

The Second Circuit, in *Sullivan v. Gagnier*, 225 F.3d 161, 165-66 (2nd Cir. 2000), held that:

> [t]he fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of *some* degree of force, but it does not give the officer license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer.

Sullivan, 225 F.3d at 165-66.

The Eleventh Circuit, in *Galvez v. Bruce*, 552 F.3d 1238 (11th Cir. 2008), held that the force used "must be reasonably proportionate to the need for that force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight." *Id.* at 1243. Again, the "actively resisting factor is subsumed into danger to the officer and risk of flight; "resistance" does not stand alone as a factor isolated from those two aspects of the determination. *See also*, *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008) (still applying some *Johnson v. Glick* factors, including the relationship between the need for force and the amount used).

These Circuits conflict with the Seventh Circuit in the decision below as well as in *Plakas v. Drinski*, 19 F.3d 1143, 1149 (7th Cir. 1994) ("[w]e do not believe the Fourth Amendment requires the use of the least or even a less deadly alternative so long as the use of deadly force is reasonable under *Garner v. Tennessee* and *Graham v. Connor*. . . .")

The Eighth Circuit is also in conflict with those Circuits recognizing that type and degree of force used should match the need is part of the Fourth Amendment reasonableness determination. In *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995), the Eighth Circuit judged the case by this standard: "[t]he Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively "reasonable" under the Fourth Amendment."

See R. Harmon, "When is Police Violence Justified?", 102 Nw U. L. Rev. 1119, 1173 (2008) ("[b]ecause these courts [citing the Seventh and Eighth Circuit opinions in *Plakas* and *Schulz*] do not recognize that force must be proper in degree to satisfy a necessity requirement, they permit excessive force.")

While Fourth Amendment reasonableness does not require "the least intrusive means", *e.g.*, *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983), the force

used must still be within the objectively reasonable choices. Implicit in *Graham* is also the principle that the use of force must be reasonably necessary in degree under the circumstances. *Id.*, 490, U.S. at 395-396.

B. The Issue Involved In the Conflict is Recurring and is a Question of National Importance.

The issue of how resisting arrest affects the amount of force which law enforcement officers are justified in using under the Fourth Amendment is a daily issue in every place where they interact with the public.

Excessive force lawsuits in the federal courts pursuant to 42 U.S.C. § 1983 are common, everyday filings. A Westlaw search on April 23, 2010 showed 26,295 documents citing the *Graham v. Connor* opinion.

Academic commentators have strongly advocated for additional, specific guidance from the Court by which the lower courts may better determine the contours of objectively reasonable use of force under the Fourth Amendment.

See, e.g., "the Supreme Court has provided a barren legal scheme filled with judicial intuition about what matters in police uses of force, but devoid of a satisfactory structure with which others can engage." Rachel A. Harmon, "When is Police

Violence Justified?", 102 Nw L. R. 1119, 1146 (2008) (urging the Court to adopt a doctrinal framework centered on necessity, imminence, and proportionality for the further development of a coherent and principled Fourth Amendment jurisprudence that balances the goals of law, order, and police safety against the costs of unnecessary violence by the police, at 1166-67).

See also, William J. Stuntz, "Privacy's Problem and the Law of Criminal Procedure", 93 Mich. L. Rev. 1016, 1044 n. 93 (1995) ("one searches in vain for any body of case law that gives this standard [Fourth Amendment objective reasonableness] some content"); John C. Jeffries, Jr. and George A. Rutherglen, "Structural Reform Revisited", 95 Ca. L. Rev. 1387, 1417 (2007) (far from being precise and rule-like, the *Graham* objectively reasonable standard for excessive force is inevitably judgmental and irreducibly vague).

See also, Note, 122 Harvard L. Rev. 1706, 1721-22 (2009) ("[i]n the United States, there is little legal doctrine governing police use of excessive force. As brutality remains a problem and law enforcement challenges continue to grow, there has never been a better time to add flesh to the skeletal understandings of force found in the text of the Fourth Amendment.")

See also, Ronald J. Allen, et al., Comprehensive Criminal Procedure, 509 (2d ed. 2005) (of all police behaviors that Fourth Amendment law regulates,

arrest should be subject to the most stringent legal standards).

When the Supreme Court sets reasonable, workable guidelines for police use of force, it saves lives. The *Garner* decision was associated with an approximately 16% reduction in police homicides. Notes, "Retreat: The Supreme Court and the New Police", 122 Harvard L. Rev. 1706, 1712 n. 40 (2009); according to FBI data, that 12% of arrestees resisted arrest is one of three reasons felony suspects were killed during the arrest. David Dante Troutt, "Screws, Koon, and Routine Aberrations: the Use of Fictional Narratives in Federal Police Brutality Prosecutions", 74 N. Y. U. L. Rev. 18, 105 n. 321 (1999).

Many incidents of excessive force stem from police overreactions to resistance by arrestees and follow legitimate uses of force. Rachel A. Harmon, "When is Police Violence Justified?", 102 Nw L. R. 1119, 1163 (2008).

Based on these statistics, if the rule regarding resistance to arrest advanced in the decision below is left in effect and usable by law enforcement in everyday encounters with citizens, that upon any type and any degree of resistance to arrest by the arrestee, all force thereafter used by law enforcement officers is constitutional, it would likely result in additional, needless injuries and deaths.

Petitioner here is only requesting at minimum that the Court make explicit what is already implicit in *Graham v. Connor* and the underlying legal history and related authority cited herein, that the term "actively resisting" is actually redundant and is part of defeating the arrest by force or flight, and the implications for self-defense by the officer in response to imminent threat of bodily harm from the arrestee, and that the Fourth Amendment prohibits force that is objectively unreasonable, both in the decision to implement it and in the type and degree of force used. *Graham* at 394-396.

This clarification would comport with the fundamental purposes of the Fourth Amendment: *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("[t]he Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *Terry v, Ohio*, 392 U.S. 1, 19 (1968) (the judicial inquiry into reasonableness of search and seizure is a dual one of whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the original interference); *Atwater v. Lago Vista*, 532 U.S. 353, 372, (2001), O'Connor, J., dissenting, "the Fourth Amendment expressly requires [the action] be a reasonable and proportional response to the circumstances of the offense. . . ."

The rule advanced in the decision below also leaves the people of this country less protected from police abuse of force than the level set under international human rights guidelines. The United Nations "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials", General Provisions 4 and 5 provide, in part:

> 4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
>
> 5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life.

III. The Decision Below is Incorrect

The trial court's admission of the Decedent's prior arrest for domestic battery was erroneous because the Plaintiff did not "open the door" to the evidence by testifying that her son had never been treated like a criminal before – as he was in the courtroom that day, the statement was first elicited

on cross-examination, the statement was on an irrelevant, collateral matter, it was undisputed at trial that the Respondents did not know of the prior arrest, and the admission of the prior arrest injected unfair prejudice into the trial, harming Plaintiff's substantial rights.

A. The court below erred in holding that the circumstances of the prior, unrelated arrest is a fact in issue under FRE 404(b) because it is undisputed at trial that the Respondents did not know about the prior arrest.

The decision below affirmed the jury verdict for Defendants on all counts on the basis that the District Court's admission of the Decedent's prior arrest for domestic battery, for which the charges were dismissed, was not an abuse of discretion because the prior arrest was related to Decedent's "knowing how to behave during an arrest", and referencing two drug crime cases involving prior arrests admitted pursuant to Fed. R. Evid. 404(b).

The panel decision holds: " Richman's testimony implied that Jack had never been arrested and thus did not know how to behave when restrained. The defendants' evidence that Jack had been arrested before, had gone quietly, and was not maltreated was probative to rebut Richman's contentions." Panel Decision at App. 6.

The alternate grounds of the decision below are insufficient to support its judgment.

This is a different reason than the one used by the District Court in admitting the prior arrest, which was either the "opening the door" doctrine or "impeachment" of a witness' credibility. See Plaintiff's Opening Brief below at 11. While an Appellate Court may affirm the trial court on alternate grounds found in the record, so long as the alternate grounds are adequately supported in the record and the law, *Continental Ins. Co. v. M/V Orsula*, 354 F.3d 603, 606 (7th Cir. 2003), this alternative basis for affirming the admission of the prior arrest is grounded in several clear errors of law and undisputed fact.

Under Fed. R. Evid. 404(b), evidence of prior bad acts is admissible to prove motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. The first prong of the 404(b) analysis, *e.g.*, *U.S. v. Owens*, 424 F.3d 649, 653 (7th Cir. 2005), is admission of the prior bad act must have been directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged. Here, this prong cannot be met on this record and the law.

Whether the Decedent resisted arrest on a prior occasion was not a matter in issue or a fact of consequence, because there is no evidence in the record that Defendants knew of the prior arrest on the date of the occurrence. No evidence was entered into the record at trial that the prior arrest was known to any of the 18 Defendants on the day of

the incident at issue. See Defendants' trial transcripts. Therefore, it must be taken as an undisputed fact for this appeal that the Defendants were not aware of the prior arrest on the day of the incident at issue.

The panel decision holding that the prior arrest was relevant directly contradicts the specific holding of *Saucier v. Katz*, 533 U.S. 194, 207 (2001), overruled on other grounds, *Pearson v. Callahan*, 129 S.Ct. 808 (2009). In *Saucier*, the Court held "[e]xcessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Id.* at 207; *see also, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (reasonableness is measured by the facts available to the officer at the time he makes the relevant factual determination). Here, this standard is not met. See Defendants' transcripts. *See also, e.g., U.S. v. McCarthur*, 6 F.3d 1270, 1279-80 (7th Cir. 1993) (district court abused its discretion by admitting the fact of a prior arrest without more: "the relevance, if any, of McCarthur's prior arrest for possession lay in the circumstances culminating in the arrest, not the arrest *per se*").

B. The court below erred in summarily affirming that the jury verdict was not against the manifest weight of the evidence based on there having been enough disputed fact at the qualified immunity stage to send

> the case to trial, because the evidence at trial on causation changed significantly from what was presented to the appellate court at the qualified immunity stage.

The decision below erred in summarily affirming the trial court's denial of the Petitioner's claim that the jury ignored conclusive evidence of liability, and without taking into consideration the changed, or clarified cause of death. It held, "[a]fter the second appeal, we remanded this case for a trial precisely because the evidence could support a verdict for either side." App. 7.

In both of the previous reported opinions of the Circuit Court in this case, the evidence taken as true at those stages showed that positional asphyxia was caused by the deputies sitting on the Decedent's back while he was prone. *Richman I*, 270 F.3d 430, 433 (7th Cir. 2001) ("[a]ccording to the complaint, ... deputies sat on ... him), *Richman II*, 512 F.3d 876, 880 (7th Cir. 2008) ("[b]y then, several of them were on Richman's back", "[h]ypoxia . . . . can also be induced by compressing the lungs, which the weight of several persons on one's back can do"). But at trial, none of the deputies admitted that any of them were on his back, nor applied any weight to his back. However, also at trial, the Medical Examiner's physician (former) changed, or clarified his testimony as to the cause of death, that additional weight on his back was not a necessary cause of the positional asphyxia – that placing such a morbidly obese person in a prone position and

holding him there while he could not breath was alone enough to have caused the chain of physiological events leading to death. See transcript of Dr. Aldo Fusaro, 37-38. Therefore, one of the proximate causes of the death matched the Respondents' actions exactly, proving causation as a matter of law.

The jury verdict in favor of the defendants ignored conclusive evidence of liability and was against the manifest weight of the evidence based on the undisputed trial testimony of the eighteen defendants. The deadly force they used in placing the morbidly obese Decedent on his belly and forcing him to remain in that position until he was dead from restraint hypoxia and heart failure was unreasonable force as a matter of law, because several of them admitted at trial that they knew, and the rest should have known, that they could harm a heavy person by doing so and yet did so, and gave no adequate reasons justifying their continuing application of force until his death.

While approx. 6- 10 bailiffs held him on his stomach until he was dead, the Decedent was "passively" resisting by pulling his arms in underneath his body, (trying to breathe), and kicking his legs up trying to get them off of him, and prior to that, pulled his arms away from them while he was still standing up to avoid being arrested.

The decision below conflicts with *Tennessee v. Garner* by ignoring that it is undisputed that Defendants knew Decedent was unarmed, being arrested for a misdemeanor, not fleeing, and presented no imminent threat to anyone in the courtroom yet applied lethal force to his body until he was dead.

The panel decision conflicts with the specific holding of the United States Supreme Court in *Tennessee v. Garner*, that lethal force is not allowed for arrests for misdemeanor crimes. *Garner*, 471 U.S. at 15; James O. Pearson, Jr., Annotation, Peace Officer's Civil Liability for Death or Personal Injuries Caused by Intentional Force in Arresting Misdemeanant, 83 A.L.R.3d 238, 245-47 (1978), cited in Pl.'s brief below at 30, ("it has been universally held that a peace officer may not use deadly force against a fleeing misdemeanant even though such force is necessary to prevent the suspect's escape.")

Here, it is undisputed that Defendants did not believe at the time of the prone restraint that Decedent was fleeing.

It is also undisputed that the two officers who began the arrest of the Decedent, Deputies Kim and Pickell, knew the level of crime for which he was being arrested because they were both there when the judge ordered him arrested for contempt of court. See Pickell and Kim Tr. The rest of the defendants had objectively enough time and the

duty to determine for themselves what the level of the crime was because the incident went on for seven minutes, from the beginning of the arrest until the Decedent displayed no signs of life when they turned him over, face up, from the prone restraint they held him in while he was suffocating. See Zimmerman Tr. 22 (there were seven minutes from the time the alarm went off until the paramedics were called).

It is also undisputed the Decedent was not using the level of force against the officers or others of an objective type which placed them in jeopardy of serious harm – Decedent was kicking while held prone but then they held his legs. See Foster Tr. This clearly shows control by Defendants, and no imminent threat of, nor actual, serious harm. At that point they could have, and had the duty to, allow him to breath.

Here, this highly prejudicial error of admission of the irrelevant prior arrest should result in a new trial. *E.g.*, *Lemons v. Skidmore*, 985 F.2d 354, 359 (7th Cir. 1993) (in excessive force action by inmate error of requiring inmate to appear before jury in handcuffs and leg irons without inquiry as to whether such restraints were necessary was not harmless; evidence was not so overwhelming that any prejudice was irrelevant in light of inmate's scars and limp inconsistent with guards' story).

There is a complete absence of probative facts in the record for the verdict that

Defendants were justified in their actions. This verdict also meets the standard for a new trial because a verdict is against the weight of the evidence. *Latino v. Kaizer*, 58 F.3d 310, 315 (7th Cir. 1995), "the jury's verdict resulted in a miscarriage of justice or where . . . [it] cries out to be overturned or shocks our conscience."

All Defendants' claims of justification for what they did to Jack Richman are contrary to existing law, their undisputed admissions of fact on the stand at trial, and their pre-trial admission of facts, proving that liability is met.

Defendants' justification based on "urgency" regarding courtroom proceedings being disrupted is an arrogation of a power that the rule of law vests in the judge. Pl.'s Opening Brief at 28-30. See Kim Tr. 156 (it was an emergency because court could not proceed due to his not obeying judge's order, then Dep. Kim was impeached as to this testimony on the next page, Tr. 157, if they did not arrest him, no one was going to be immediately injured); Velisaris Tr. 104-105 (Q – did he ever do anything to threaten the safety of anyone in the courtroom? Impeached before the jury – he answered "No" to this question in his deposition).

The undisputed facts, viewed in the light most favorable to the Defendants, plainly show that the force used was unnecessary and disproportionate. Defendant (supervisor) Smith

ordered the "take down." Sulkin Tr. 177, 211-12; Velisaris Tr. 115-116 (when they gained some control over him they backed him up a pace and turned him around); Smith Tr. 257.

Jack Richman's initial passive resistance to arrest by holding onto the podium (some of the Defendants testified that he was waving his arms in the air, and one claimed he "swung" at the officers), was overcome and controlled when several of the Defendants took him by either side and were able to walk him back a step. See Velisaris Tr. 115-116 (when they gained some control over him they backed him up a pace and turned him around).

Clearly, then, they had control over him at that point, and any additional force was excessive, including the "take down" and the long prone restraint, the deadly force by which the Defendants took his life. The Defendants had alternative means to effect the arrest – they could have just continued walking him back into the lockup instead of forcing him to the ground and then suffocating him to death.

Neither did they "have" to handcuff his hands behind his back while they held him prone. Pickell Tr. 114-115 (while he was on the ground, there was the risk of imminent harm to the people in the room and to other deputies because he was not handcuffed) – this is an objectively unreasonable, generalized "fear"

with no supporting facts; Greve Tr. 35-36 (could not leave his arms underneath him would not have been safe for anybody involved) – also objectively unreasonable. They could have continued to hold his arms on either side while he was on the ground, helped him back onto his feet, and then walked him back into the lock up. Also, his holding his arms underneath his body while prone was at most "passive resistance", to which no additional force was justified, as well as his exercising his right to self-defense to try to save his life in the face of Defendants' extreme force of holding him down and preventing him from breathing. Jack had the right to try to take his last breaths by trying to keep his arms under his body to push his abdomen upward so he could remain alive. See Plaintiff's Briefs below, II.

The Defendants failed in their duties as law enforcement officers by their unnecessary choice to use deadly force on Jack Richman through his death, because they utterly defeated the legitimate, primary governmental interest in apprehending crime suspects, which is to "set [ ] the criminal justice mechanism in motion." *Kidd*, 774 F.2d at 1256, quoting *Garner*.

Most of the Defendants, in testifying at trial, were unable to distinguish between "actively" and "passively" resisting arrest. They called "actively resisting" what clearly was passive resistance and/or actions not even involving any

use of physical force by the Decedent, and never involving an attempt to flee because it is undisputed by Defendants that the Decedent never attempted to flee at any time during the incident at issue. See Defendants Transcripts: Lowry Tr. 58 (yes, Decedent's holding onto podium constituted active resistance); Plucinski Tr. 22 (having his arms underneath him while he was prone is active resistance); (at time of trial promoted to "Chief" – head of all Sheriff Cook County Court Services) "Chief" Jackson Tr. 84 (made no distinction between an "active" resister or passive one); Clark Tr. 85 (face down unhandcuffed is a threat in and of itself, Tr. 131, because 500 lbs. is a danger in himself); Velisaris Tr. 112 (threatening safety of officers is resisting attempts to place into custody by moving away, pulling arms away); Sulkin Tr. 200, 212 (holding onto something to thwart arrest is an active resister); Gantman Tr. 175 (he was resisting arrest and could have been a threat to anyone, I saw him as a threat for resisting); Clark Tr. 71, 73 (we treat murderers and shoplifters the same, anyone who walks in holds the same level of threat), Clark Tr. 83 (not complying is a threat); Foster Tr. 103-104 (when Jack Richman was grabbing onto the podium and not obeying orders he was an active resister); McPhillips Tr. 91 (having his arms under his chest [while prone] is actively resisting); Gantman Tr. 35 (passive and active resistance means noncompliant, Tr. 38, passive resistance does not matter, Tr. 39, does not

remember if the Fourth Amendment puts some limitation on his ability to use force).

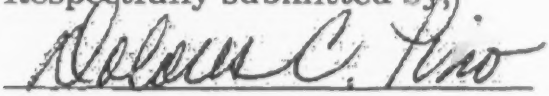
This record shows an outrageously extreme miscarriage of justice that occurred at trial and on the day of Jack Richman's death. A reasonable person looking at this case, seeing a young, morbidly obese male Citizen who walked with a cane, who had gone through the courthouse metal detector, go into a courtroom as a witness to a traffic ticket, and then who spoke to the judge, and then who came out of the courtroom with no signs of life, and whose body then arrived dead at the nearest hospital, would conclude that the law enforcement officers involved had violated his fundamental rights in a shocking, horrific way. The force applied, being one of the proximate causes of Jack Richman's death, was so disproportionate to the need presented, that it amounted to a brutal, inhumane abuse of official power, literally shocking to the conscience.

Respondents' application of lethal force through death to Jack Richman, a nonfleeing, nonviolent, stationary misdemeanant to gain his "compliance" was not constitutionally justified.

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted by,



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April 29, 2010

APPENDICES

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 2010

Before

Frank Easterbrook, *Chief Judge*

Richard A. Posner, *Circuit Judge*

Kenneth F. Ripple, *Circuit Judge*

No. 09-1176 — Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

MARCELLA RICHMAN,
as special administrator
of the estate of Jack B. Richman,
deceased,
Plaintiff-Appellant,
v.

No. 98 C 7350

Joan B. Gottschall,
Judge.

MICHAEL SHEAHAN, et al.,
Defendants-Appellees.

ORDER

On January 13, 2010, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

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* Circuit Judge Ilana Diamond Rovner did not participate in the consideration of this petition for rehearing.

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 21, 2009
Decided December 23, 2009*

Before

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

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* This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examining the briefs and the record, we have concluded that oral argument is unnecessary. *See* FED. R. APP. P. 34(a); CIR. R. 34(f).

No. 09-1176 Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

MARCELLA RICHMAN,
as special administrator
of the estate of Jack B. Richman,
deceased,
Plaintiff-Appellant,
v. No. 98 C 7350

Joan B. Gottschall,
Judge.

MICHAEL SHEAHAN, et al.,
Defendants-Appellees.

ORDER

In 1997 Marcella Richman's son, Jack, a severely obese man, suffocated and died after deputy sheriffs used force in attempting to remove him from an Illinois state courthouse where he was resisting the officers and defying a judge's order to leave. After two earlier appeals to this court, *Richman v. Sheahan*, 512 F.3d 876 (7th Cir. 2008); *Richman v.* [end of p. 1] *Sheahan*, 270 F.3d 430 (7th Cir. 2001), the case finally went to trial on the claims that the officers violated Jack's rights under the Fourth and Eighth Amendments. A jury returned a verdict in favor of the defendants on all counts, and, after denying Richman's motion for a

new trial under FED. R. APP. P. 59(a), the district court entered judgment in their favor. On appeal Richman raises two arguments: The district court improperly admitted evidence of Jack's prior arrest, and the jury ignored what Richman describes as compelling evidence of liability on the Fourth Amendment claim.

We begin with the district court's decision to admit the evidence that Jack had been arrested once before. Richman testified that Jack had "never been treated as a criminal," and the defendants responded with evidence of a prior arrest during which he knew not to resist. The defendants' argue on appeal that Richman waived any challenge to the district court's admission of the arrest by failing to raise it in her Rule 59 motion, but this argument is frivolous. Richman preserved the evidentiary point by making a contemporaneous objection. *See* FED. R. EVID. 103(a)(1); *Wipf v. Kowalski*, 519 F.3d 380, 385 (7th Cir. 2008). Nonetheless, the district court's decision to admit evidence of Jack's prior arrest was not an abuse of discretion. *See United States v. Chavis*, 429 F.3d 662, 669 (7th Cir. 2005). Richman's testimony implied that Jack had never been arrested and thus did not know how to behave when restrained. The defendants' evidence that Jack had been arrested before, had gone quietly, and was not maltreated was probative to rebut Richman's contentions. *See United States v. Perkins*, 548 F.3d 510, 514 (7th Cir. 2008).

Richman's next argument on appeal – that the verdict in favor of defendants was unreasonable as a matter of law – fares no better. After the second appeal, we remanded this case for a trial precisely because the evidence could support a verdict for either side. Because the evidence in this case "was sufficient to pave a rational path to the jury's finding," *Davis v. Wisconsin Dep't of Corrections*, 445 F.3d 971, 976 (7th Cir. 2006), Richman is not entitled to judgment as a matter of law.

AFFIRMED. [end of p. 2]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 – 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

January 7, 2010

By the Court:

No.: 09-1176

MARCELLA RICHMAN, as Special Administrator of the Estate of

JACK B. RICHMAN, deceased,
Plaintiff-Appellant

v.

MICHAEL SHEEHAN, individually and as Sheriff of Cook County, et al.,
Defendants-Appellees

Originating Case Information:

District Court No: 1:98-cv-07350
Northern District of Illinois, Eastern Division
District Judge Joan B. Gottschall

Upon consideration of the **PLAINTIFF-APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**, filed on January 6, 2010, by counsel for the appellant,

IT IS ORDERED that the motion is **GRANTED**. Any petition for rehearing or rehearing en banc shall be filed by January 13, 2010.

Richman Tr. 4-5, 44-64:

Richman, direct, at 4-5:
11 And when he said that, please let me explain, the
12 judge gave him 30 days and said if he didn't go, he would -- it
13 would be more.
14 And the judge -- Jack said something else to him in
15 regard to it again, pleading. And the judge said, 60 days.
16 And at that point what when he said 60 days, two of
17 the bailiffs came up from behind Jack, and if -- if you could
18 have seen Jack's face, he was shocked. What was happening?
19 Why was this going on?
20 He had done nothing wrong and he couldn't figure it
21 out. It was all over his expression. I can't begin -- for ten
22 and a half years I have had that picture in my mind of my poor
23 kid looking as if what's going on.
24 And then when the -- when the officers came on him
25 from behind, he didn't know who was there or what they were
p. 5 Richman - direct by Boyle

1 doing. When he -- he said, the pain, the pain. And he grabbed
2 for the podium and held on for dear life because he didn't know
3 what was going on in the back. And they are pulling on his
4 arms and whatnot.
5 And I kept saying -- and believe me I had a strong
6 voice in 1997. And I screamed, let him alone, he is hurt, let
7 him alone. And nobody stopped.
8 Then the judge out of the clear

See Richman Tr. at 46, lines 6-10 (emphasis added): Richman - cross by Pechous
1 Q. And if your son would have walked in the lock-up, it could
2 have been worked out.
3 A. I'm sorry, I couldn't hear you.
4 Q. If Jack would have just walked in the lock-up, it could
5 have been worked out.
6 A. You know, here is a young man who was neither -- he didn't
7 even have so much as a traffic ticket against him. You know,
8 how does a -- a suburban kid, 38 years in suburbia, handle a
9 situation when he's done nothing wrong? *And he's never been*

> *10 treated as a criminal.* And all of a sudden all of this.

Then, before finishing his cross-examination, defense counsel asked for a break, the jury left the room, and he requested that he be allowed to question the Plaintiff regarding her son's prior arrest, Richman Tr. at 48-49:

> MR. PECHOUS: Judge, there is another issue based upon
> 6 the testimony. Mrs. Richman testified that he had never been
> 7 treated like -- Jack had never been treated like a criminal
> 8 before. I would like to ask -- basically three questions about
> 9 an incident that happened in August of 1997 where he was
> 10 arrested and handcuffed. The -- the substance of the
> 11 allegation I will not bring in.
> 12 But I think at this point the fact that he was --
> 13 THE COURT: What's this about?
> 14 MR. PECHOUS: Well, he was arrested in August of 199?
> 15 THE COURT: Yeah.

16 MR. PECHOUS: This is on that domestic violence
17 charge. And, again, I'm not going to ask --
18 THE COURT: Right.
19 MR. PECHOUS: -- anything about domestic violence.
20 But she said he has never been treated like a
21 criminal. All I'm going to ask is, he was arrested in August
22 of 1997, you were there, he was handcuffed, and he didn't
23 resist. That's it.
24 THE WITNESS: I have to tell why.
25 THE COURT: Hold on. Hold on.
p. 49 Richman - cross by Pechous
1 THE WITNESS: I'm sorry. I'm sorry.
2 MR. PECHOUS: That's it. I am not going to get into
3 -- and if they want to bring out that those charges were
4 dismissed, I'll even ask, if you want, that those charges were
5 later dismissed.
6 THE COURT: He simply to -- because there has been
7 testimony that he was never treated like this before.
8 MR. PECHOUS: Yes.
9 THE COURT: I think with those limitations it is okay.

After objections, argument, and a voir dire of the Plaintiff about the details, the District Court's final oral ruling admitting questioning about the Decedent's prior arrest is at Richman Tr. at p.62, lines 9-24:

> Okay. Number one, in terms of who opened this up, the
> person who opened this up is Mrs. Richman because on the stand
> in response to a question that did not call for this kind of a
> speech said Jack Richman was never treated like this before.
> It is now clear that very shortly before this occasion
> he was arrested, he was placed in a squad car, and he was taken
> to the police station. There is no evidence that he was
> handcuffed.
> If the defense wants to bring this out with those
> limitations and also that the charges were ultimately
> dismissed, it is fine with me if you do that. That the charges
> were ultimately dismissed I think probably needs to come out to

make this not a prejudicial --
MR. PECHOUS: Sure.
THE COURT: -- incident. But it does impeach that he
was never treated like this before, whatever that means.